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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

70-103

No. ~~511~~

LAWRENCE E. WILSON, et al., *Petitioners,*

vs.

CHARLES ALLISON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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vs.

CHARLES ALLISON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners, appellees below, respectfully petition that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court entered on November 24, 1970, as modified on December 29, 1970, reversing the order of the United States District Court for the Northern District of California.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 434 F.2d 646 (1970), and is also appended hereto as Appendix A. The order of the United States District Court for the Northern District of California is unreported and is appended hereto as Appendix B.

JURISDICTION

On November 24, 1970, the United States Court of Appeals for the Ninth Circuit reversed the order of the United States District Court for the Northern District of California which had dismissed respondent's complaint in an action brought under provisions of the Civil Rights Act. A petition for rehearing resulted in a modification of the opinion on December 29, 1970, although the result was not altered. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

QUESTION PRESENTED

Is every intentional tort committed by a state employee a violation of the Civil Rights Act?

STATUTE INVOLVED

This case involves interpretation of Title 42, United States Code, section 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any

State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Charles Allison, a state prisoner, filed a complaint in the United States District Court for the Northern District of California on September 1, 1966. A motion to dismiss was filed on October 18, 1966. On February 9, 1967, the Honorable Robert F. Peckham, United States District Judge, entered an order dismissing the action against the State of California, dismissing the action with leave to amend against Lawrence E. Wilson, Warden of San Quentin State Prison, and denying the motion to dismiss as to R. J. Thomas and P. G. Hayes, custodial officers assigned to the prison. An answer was filed by defendants Thomas and Hayes on February 28, 1967.

On March 1, 1967, Allison filed an amended complaint. Defendants filed a motion to dismiss, or in the alternative, a motion to strike and for a more definite statement, on March 9, 1967. On April 5, 1967, the Honorable William T. Sweigert, United States District Judge, dismissed the action as to defendant Wilson, but denied defendants' motion in all other

respects. An answer to the amended complaint was filed on April 14, 1967.

On November 17, 1967, Allison requested the appointment of counsel. Defendants opposed the request in a memorandum filed on November 24, 1967. On December 1, 1967, the Honorable Albert C. Wollenberg denied the motion for appointment of counsel, finding that the suit was "part of a patently vindictive scheme to utilize the provisions of the Civil Rights Act for the purpose of harassing law enforcement officials and other persons who are part of the administration of justice" and that the allegations of fact were probably false. This opinion is reported at 277 F.Supp. 271 (1967).

On April 17, 1968, defendants filed another motion to dismiss based upon several new decisions interpreting Title 28, United States Code, section 1983. Allison's opposition thereto was filed on May 3, 1968. On June 20, 1968, the Honorable William T. Sweigert dismissed the amended complaint. The order of dismissal, which is unreported, appears as Appendix B. Notice of appeal was filed on July 16.

On November 24, 1970, the United States Court of Appeals for the Ninth Circuit reversed the district court. On December 8, petitioners filed a petition for rehearing. The Court of Appeals modified its former opinion on December 29, 1970. The modified opinion, which is published in 434 F.2d 646 (1970), appears as Appendix A.

STATEMENT OF FACTS

Charles Allison, a state prisoner, filed an amended complaint against Lawrence E. Wilson, Warden of the California State Prison at San Quentin, and two correctional officers at that prison, R. J. Thomas and P. G. Hayes. Allison alleged that on June 2, 1966, as he was returning to his cell at 10:15 p.m.,

> "He [Officer Hayes] demanded in a rough, unnecessary tone of voice: 'Where do you live?' Plaintiff replied: 'I live right here.' Officer Hayes said: 'From now on you be in front of your cell because I have been waiting to get you.' Plaintiff replied: 'I just came in from the A.A. meeting.' Officer Hayes answered: 'I don't care where you came from,' [sic] Plaintiff replied: 'It isn't in the rules to be there to lock up until the buzzer sounds.' Officer Hayes answered: 'I will show you some new rules.' Whereupon the plaintiff entered the door of his cell and officer [sic] P. G. Hayes kicked the door shut, hitting the plaintiff and forcing him into the cell with a steel barred door, weight approximately three hundred pounds."

Allison alleged that he had had to seek, and had received, medical treatment for the injury to his back.[1]

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[1]Judge Wollenberg's order of December 1, 1967, in which he found that there was "a substantial likelihood that the allegations of fact are false," was based, in part, on the following:

> "In the present case, as an exhibit filed on April 14, 1967, this Court was furnished with a copy of a letter written by the Chief Medical Officer and another doctor which indicated that plaintiff's symptoms had begun before the alleged incident and that there was 'scant evidence of anything more than a common minor muscular complaint which is directly related often to the mental attitude of the patient.'" 277 F.Supp. at 272-73.

Allison also alleged that on August 19, 1966, he was walking through the prison and was stopped by Officer Thomas, who pushed him up against a fence and then took him into an office.

> "Thomas stood on plaintiff's foot while he was talking, for approximately ten (10) minutes. Then he shook plaintiff down and when he got to plaintiff's feet he jerked plaintiff's feet from under him, throwning [sic] plaintiff against the wall, and as a result this popped a ligament in plaintiff's back and plaintiff had to report back to the hospital."

It was alleged that these two incidents infringed upon Allison's federal constitutional rights to be free of cruel and unusual punishment, to have due process and equal protection of law, and to assemble and petition the government for grievances.

REASONS FOR GRANTING THE WRIT

It has been the painful experience of federal courts that state prisoners use the provisions of the Civil Rights Act not as a legitimate means of redressing genuine grievances but as a blackjack with which to harass their jailers. This tendency is reflected in national statistics showing that Civil Rights suits have more than trebled in the last four years. It is especially true in California where, in at least one district, prisoner Civil Rights complaints constitute more than one-fourth of the entire civil docket.

When Congress drafted and enacted the Civil Rights Act in 1871, it did not intend that Act to supplant state tort actions. The Act was supposed to create a new cause of action for deprivations of federal civil rights, leaving ordinary torts to the state courts. Intentional torts such as assault and battery were not considered inherent violations of civil rights. This Court so held in *Screws v. United States,* 325 U.S. 91, 108-09 (1945). Although this Court did not look to congressional intent in deciding *Screws,* it is clear from the debates that this Court properly assessed the scope of the statute therein. The Ninth Circuit, however, despite *Screws* and the opinions of other circuit courts, has so broadly construed the Civil Rights Act that any intentional tort committed by a state employee is actionable under that statute. The opinion of the Ninth Circuit herein conflicts with not only the *Screws* opinion, but with several opinions of several other circuits as well.

The petition for certiorari herein should be granted to do more than resolve an apparent conflict among the circuits and between the Ninth Circuit and this Court. The Civil Rights Act has not been thoroughly examined by this Court since *Monroe v. Pape,* 365 U.S. 167 (1961). The growing number of Civil Rights cases has become a substantial portion of the caseload in California's federal courts, and probably elsewhere as well. This swelling flood can be directly attributed to decisions such as that at issue here where the Ninth Circuit has in effect construed the statute to embrace every intentional tort. It is time

for this Court to confine Civil Rights suits to the parameters intended by Congress.

ARGUMENT

THE CIVIL RIGHTS ACT DOES NOT MAKE EVERY INTENTIONAL TORT BY A STATE EMPLOYEE ACTIONABLE. THUS A SIMPLE ASSAULT AND BATTERY DOES NOT IN ITSELF STATE A CLAIM UNDER THE STATUTE.

It has been the sad experience of the California federal courts that state prisoners find in the Civil Rights Act an ideal weapon for the harassment of those state officers charged with the duties of custody and rehabilitation.

> "The prospect of amercing their jailers in damages must be a most tempting one, even if it will not get them their freedom. . . . Particularly since Monroe v. Pape, . . . it has become apparent that the 'jailhouse lawyers' think that they have a new bonanza in the Civil Rights Act." *Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir.) (Duniway, J., concurring), cert. denied, 375 U.S. 845 (1963).

Or as another judge put it:

> "[P]ersons convicted of crimes and in the custody of their jailers do not look upon the case of Monroe v. Pape . . . and other cases . . . as a pronouncement of principles for the redress of genuine grievances or wrongs, but rather as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy . . . their jailers [and others] . . . ." *Roberts v. Barbosa,* 227 F. Supp. 20, 21 (S.D. Cal. 1964).

The potential for abuse of the Act has been enhanced by numerous decisions of the Ninth Circuit which have, in effect, extended liability under the Civil Rights Act to any intentional tort allegedly committed by a state employee. Thus in *Wiltsie v. California Dep't of Corrections,* 406 F.2d 515, 516-17 (9th Cir. 1968), the allegations of a beating by prison guards were held sufficient to state a claim. In *Hill v. Schneckloth,* ..... F.2d ....., ... (9th Cir.), cert. denied, 400 U.S. 852 (1970), a prisoner's allegation of a single kick to the buttocks by a civilian prison employee was held sufficient. And in the present case, the allegation of a blow on the back caused by slamming a cell door is held sufficient. In none of these cases was there anything more than the allegation of an isolated instance of assault and battery.[2]

These decisions have had a predictable effect upon the district courts, and virtually no case alleging an intentional tort by a prison employee is dismissed. Thus in *Conway v. Dunbar,* No. S-671 (E.D. Cal. 1970), for example, the district court refused to dismiss a complaint wherein the prisoner alleged that a guard had thrown a cup of hot coffee at him. The resultant growth in Civil Rights complaints has been an inevitable result. In the United States District Court for the Eastern District of California, Civil

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[2]These cases are to be distinguished from two other Ninth Circuit decisions in which the beatings were allegedly inflicted to *force a confession* from the prisoner: *Allison v. California Adult Auth.,* 419 F.2d 822, 823 (9th Cir. 1969) (the facts of the case, involving the same Allison, do not appear in the opinion); *Brown v. Brown,* 368 F.2d 992, n.2 at 993-94 (9th Cir. 1966).

Rights suits filed by state prisoners now account for 25% of the court's civil docket.[3] Since Civil Rights cases on the national level have trebled in the past four years,[4] it is not difficult to imagine the impact upon other federal courts should other circuits follow the lead of the Ninth.

The other circuit courts have not, however, given the Civil Rights Act as broad a construction as the Ninth Circuit has done. Thus the Seventh and Eighth Circuits have held that an isolated instance of assault and battery by prison guards does not, standing alone, state a claim under the Civil Rights Act. *Cole v. Smith,* 344 F.2d 721, 724 (8th Cir. 1965); *Knight v. Bibb,* 250 F.2d 283 (7th Cir. 1957); *United States ex rel. Atterbury v. Ragen,* 237 F.2d 953, 956 (7th Cir. 1956), cert. denied, 353 U.S. 964 (1957). The Third Circuit, in a *per curiam* opinion, affirmed a district court case reaching the same conclusion. *Kent v. Prosse,* 265 F.Supp. 673, 675 (W.D. Pa.) (dictum), aff'd *sub nom. Kent v. Prasse,* 385 F.2d 406 (3d Cir. 1967). And in a recent case, the Seventh Circuit has reaffirmed that:

> "We should not, by judicial fiat, convert what would otherwise be ordinary state-law claims for false imprisonment, malicious prosecution or assault and battery into Civil Rights cases merely on the basis of conclusory allegations in a complaint that constitutional rights have been vio-

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[3]Babcock, *Prisoners' Civil Rights Suits—A Monumental Mess* (unpublished manuscript).

[4]The Director of the Administrative Office of the United States District Courts reports an increase in filings from 1195 in 1966 to 3985 in 1970.

> lated." *Phillips v. Nash,* 311 F.2d 513, 516 (7th Cir. 1962), quoted in *Arensman v. Brown,* 430 F.2d 190, 193-94 (7th Cir. 1970).

Not only is the decision of the Ninth Circuit herein in direct conflict with the foregoing cases insofar as it holds that a simple assault and battery, standing alone, does state a claim under the Civil Rights Act, but it is inconsistent with several decisions of this Court. In *Screws v. United States,* 325 U.S. 91, 108-09 (1945), this Court declared:

> "The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States. Cf. *Logan v. United States,* 144 U.S. 263 . . . ."

In *Logan v. United States,* 144 U.S. 263, 284-85, 289-90 (1892), cited in *Screws,* this Court held that prisoners in the custody of a United States marshal had the right to be free of assault by virtue of the custodial relationship arising under federal statute, not under any general constitutional right to be free from assault. And in *Williams v. United States,* 341 U.S. 97, 104 (1951), Mr. Justice Douglas, speaking for this Court, noted that the defendants were being tried for coercing confessions *by means of assaults* rather than the assaults themselves. The opinion of the Ninth Circuit herein cannot be reconciled with these cases.

In *Screws,* this Court made no attempt to examine congressional intent with regard to whether inten-

tional, tortious acts, such as assault and battery, were in and of themselves considered violations of the Civil Rights Act. But had this Court undertaken to do so, it would have found confirmation for its position. The Civil Rights Act of 1871 was introduced in the House of Representatives on March 28, 1871, by Rep. Samuel Shellabarger of Ohio. Cong. Globe, 42d Cong., 1st Sess. 317 (1871). Included as section 2 of the proposal were criminal provisions punishing conspiracies to deprive citizens of their civil rights. In Rep. Shellabarger's original bill, section 2 embraced:

> "any act in violation of the rights, privileges, or immunities of any person to which he is entitled under the Constitution and laws of the United States, which . . . would, under any law of the United States . . . . , constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal, [sic] process or resistance of officers in discharge of official duty, arson, or larceny . . . ." *Ibid.*

In the debates on April 1, 1871, Rep. John B. Hawley of Illinois voiced the nationwide concern that the bill extended the federal criminal laws to the states. *Id.* at 382. Rep. Shellabarger answered him as follows:

> "The mentioning of these particular acts is simply resorted to as a convenient method of confining the wrongs to the class of cases which would be in fact and in law an infraction of the rights of national citizens. They are limitations, and are not meant to intimate that the crime of murder or manslaughter or anything of that kind can be punished under this bill, *if the crime be merely*

that. It is merely a method of nomenclature, of description." *Ibid.* (emphasis added).

Rep. Hawley then said:

> "I am glad that the honorable gentleman from Ohio has made this explanation . . . .
>
> " . . . .
>
> " . . . [I]n a case where a man simply takes the life of another from personal malice, from any cause aside from some such cause as that I have mentioned [i.e., interference with voting], then he must be turned over to the State authorities to be dealt with . . . ." *Id.* at 382-83.

From this dialogue, it appears clear that Rep. Shellabarger, the author of the bill, considered murder, assault, or similar acts to be the *means* by which civil rights might be invaded; not that the acts standing alone were violations of civil rights.

Rep. Shellabarger's explanation, however, was not totally satisfactory to his colleagues, some of whom erroneously interpreted it to mean that acts such as murder or assault were themselves violations of civil rights. Rep. Charles W. Willard of Vermont then offered an amendment to the committee responsible for drafting the bill, which proposal was intended to "forever exclude any such interpretation":

> "I understand the gentleman from Ohio [Rep. Shellabarger] to urge in his argument that . . . the offense of murder, for instance, the offense of robbery, the offense of mayhem, are, by the very terms of these [thirteenth and fourteenth] amend-

ments to the Constitution, offenses against the rights, privileges, and immunities of a person under the Constitution and laws of the United States. Thus interpreted, I was still unable to give my assent to that provision . . . . I still thought there ought to be a further limitation; that there ought to be such a definition or description of the offense as *would forever exclude any such interpretation.* So believing, . . . I framed an amendment . . . [which] declares it to be a crime 'if two or more persons shall, within the limits of any State, band, or conspire, or combine together for the purpose, either directly or indirectly, of depriving any person, or any class of persons, of the equal privileges and immunities under the laws, or for the purpose of preventing or in any way hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws.'

"To my mind this obviated what I regarded as a fatal objection to the section as it before stood, by providing that the *essence of crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities* under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality." *Id.* at 511, App. at 188 (emphasis added).

In response to this and other criticism, Rep. Shellabarger himself offered an amended version of section 2 in which reference to specific acts was omitted and

Rep. Willard's proposal was incorporated. *Id.* at 513. With minor amendments, this new version was enacted as section 2 of the Civil Rights Act. Compare Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13-14 with *ibid.* When the bill reached the Senate, Sen. Lyman Trumbull of Illinois correctly assessed the intent of the House and import of the statute as follows:

> "Those provisions [Rep. Shellabarger's original bill] were changed, and as the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guaranteed to them by the Constitution and laws of the United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State." Cong. Globe, 42d Cong., 1st Sess. 579 (1871).

It therefore appears clear that this Court was correct in *Screws:* murder, assault and battery, or other intentional torts do not, standing alone, establish a violation of constitutional rights.

Although *Screws, Logan,* and *Williams,* and the comments of Reps. Shellabarger, Hawley, and Willard, were focused on the criminal aspects of the Civil Rights Act, they nevertheless provide guidance in interpreting the civil provisions. These authorities demonstrate that the intentional acts themselves do not infringe upon constitutional rights, but that such

acts may be the *means* by which those rights are invaded. Thus, to establish a civil claim under the statute, there must be some such intentional act *plus* the violation of a federal statutory or constitutional right.[5] This, in fact, is how the vast majority of courts have assessed the Civil Rights Act, for they have generally found actionable claims only when an assault is incidental to the violation of a particular constitutional right.[6] Similarly, in criminal cases charging

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[5]In criminal cases, there must also be the *intent* to violate constitutional rights.

[6]See *Dodd v. Spokane County*, 393 F.2d 330, 333-35 (9th Cir. 1968) (beatings to compel testimony of witness [§ 1985]); *Brown v. Brown*, 368 F.2d 992, n.2 at 993-94 (9th Cir. 1966) (beatings to compel testimony of witness [§ 1985] and to obtain confession); *Basista v. Weir*, 340 F.2d 74, 80-81 (3d Cir. 1965) (beating in conjunction with illegal arrest); *Stringer v. Dilger*, 313 F.2d 536, 540-42 (10th Cir. 1963) (beating in conjunction with illegal arrest); *Brazier v. Cherry*, 293 F.2d 401, 402 (5th Cir.), cert. denied, 368 U.S. 921 (1961) (beating in conjunction with illegal arrest), *Hardwick v. Hurley*, 289 F.2d 529, 530-31 (7th Cir. 1961) (beating to obtain confession); *Jackson v. Duke*, 259 F.2d 3, 7 (5th Cir. 1958) (beating in conjunction with illegal arrest); *Geach v. Moynahan*, 207 F.2d 714, 715, 717 (7th Cir. 1953) (beating in conjunction with illegal arrest); *Davis v. Turner*, 197 F.2d 847 (5th Cir. 1952) (beating in conjunction with illegal search and arrest); *Beyer v. Werner*, 299 F.Supp. 967, 968-69 (E.D.N.Y. 1969) (beating to obtain confession); *Wilson v. Simon*, 299 F.Supp. 305, 308 (N.D. Ill. 1969) (beating in conjunction with illegal arrest); *Mack v. Lewis*, 298 F.Supp. 1351, 1352, 1354 (S.D. Ga. 1969) (homicide as part of conspiracy to discriminate against Negroes); *Collum v. Butler*, 288 F.Supp. 918 (N.D. Ill. 1968) (beating in conjunction with illegal arrest); *McIver v. Russell*, 264 F.Supp. 22, 25-26 (D. Md. 1967) (beating in conjunction with false arrest); *Brooks v. Moss*, 242 F.Supp. 531, 532 (W.D.S.C. 1965) (beating in conjunction with false arrest); *Bargainer v. Michal*, 233 F.Supp. 270, 273 (N.D. Ohio 1964) (beating in conjunction with illegal arrest); *Roberts v. Trapnell*, 213 F.Supp. 49, 51 (E.D. Pa. 1962) (beating in conjunction with illegal arrest); *Selico v. Jackson*, 201 F.Supp. 475, 477-78 (S.D. Cal. 1962) (beatings in conjunction with illegal arrest); *Refoule v. Ellis*, 74 F. Supp. 336, 337-39 (N.D. Ga. 1947)

assaults, the assault has generally been made in connection with the infringement of some specific constitutional right.[7] This is not, however, what the Ninth Circuit has done in this and other cases.[8] The Ninth

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(beating, in conjunction with illegal arrest, used to obtain confession).

There have been what appear to be exceptions, but they are in a distinct minority. See *Morgan v. Labiak*, 368 F.2d 338, 340 (10th Cir. 1968) (unlawful beating by arresting officer is denial of due process); *Jackson v. Martin*, 261 F.Supp. 902, 903-04 (N.D. Miss. 1966) (that policeman shot plaintiff held to state claim).

[7]See *United States v. Price*, 383 U.S. 787, n.6 at 793 (1966) (homicides to deprive persons arrested of right to trial); *Williams v. United States*, 341 U.S. 97, 101-02 (1951) (beatings to obtain confessions); *Screws v. United States*, 325 U.S. 91, 94 (1945) (homicide to deprive person arrested of right to trial); *Logan v. United States*, 144 U.S. 263, 284-85 (1892) (homicides and beatings depriving prisoners of U.S. Marshal of right to federal protection while in his custody); *Pool v. United States*, 260 F.2d 57, 59-62 (9th Cir. 1958) (beating to obtain confession); *United States v. Jones*, 207 F.2d 785, 787 (5th Cir. 1953) (beating to obtain confession); *Koehler v. United States*, 189 F.2d 711, 713 (5th Cir.), cert. denied, 342 U.S. 852 (1951) (beating after arrest denied right to trial before imposition of punishment); *Crews v. United States*, 160 F.2d 746, 749 (5th Cir. 1947) (beating after arrest denied right to trial before imposition of punishment); *United States v. Sutherland*, 37 F.Supp. 344, 345 (N.D. Ga. 1940) (beatings and torture to obtain confession).

[8]A relatively simple solution to the problem posed by prisoner Civil Rights complaints—most of which are filed *in forma pauperis*—would seem to lie in the broad discretion given a district judge under title 28, United States Code, section 1915(d). See *Shobe v. People of the State of California*, 362 F.2d 545, 546 (9th Cir.), cert. denied, 385 U.S. 887 (1966); *Smart v. Heinz*, 347 F.2d 114, 116 (9th Cir.), cert. denied, 382 U.S. 896 (1965); *Weller v. Dickson*, 314 F.2d 598, 604 (9th Cir.) (Duniway, J., concurring), cert. denied, 375 U.S. 845 (1963). Section 1915(d) was, after all, intended to afford an opportunity for redress to indigents without subjecting others to vexatious and frivolous suits. *Weller v. Dickson, supra* at 602 (Duniway, J., concurring); *Caviness v. Somers*, 235 F.2d 455, 456 (4th Cir. 1956); *Fletcher v. Young*, 222 F.2d 222, 224 (4th Cir. 1955); *O'Connell v. Mason*, 132 F.2d 245, 247 (1st Cir. 1904). But whatever protections were intended by that statute have proven illu-

Circuit was wrong to extend the coverage of the statute beyond its intended parameters.[9]

CONCLUSION

Contrary to the decisions of other circuits and of this Court, and contrary to the intent of Congress, the Ninth Circuit has held that a simple assault and battery in itself states a claim under the Civil Rights Act, thereby rendering every intentional tort committed by a state employee actionable under the statute. This broad expansion of the Act promises to glut the federal courts with tort actions which should be—and which Congress intended to be—handled by state

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sory in the Ninth Circuit. Retreating from *Shobe*, *Smart*, and *Weller* in *Williams v. Field*, 394 F.2d 329, 331-32 (9th Cir.), cert. denied, 393 U.S. 923 (1968), the Ninth Circuit held that dismissal under section 1915(d) is appropriate only where it appears on the face of the complaint that the claim could be dismissed *sua sponte* or where the allegations were refuted by the records of the court itself. Thus in the present case, the district court initially refused to dismiss the proceedings under section 1915(d) even though the doctor who had treated the plaintiff could find *no evidence of injury* and believe him to be a malingerer.

[9]In advocating this interpretation of the Civil Rights Act, we do not suggest that beatings by prison guards can never be reached by federal courts under the statute. Our interpretation applies only to isolated instances. However, when beatings or other tortious conduct is not a singular event, but is part of an accepted practice in the prison, then the condoned course of conduct may rise to the level of cruel and unusual punishment which is actionable under the Civil Rights Act. See *Jackson v. Bishop*, 404 F.2d 571, 573-75 (8th Cir. 1968) (customary beatings with strap for infractions of prison rules); *Johnson v. Dye*, 175 F.2d 250, n. 12 at 256 (3d Cir.), rev'd on other grounds, 338 U.S. 864 (1949) (unspecified cruelties of which leg irons and constant beatings were termed "minor ones").

courts. For these reasons, we respectfully urge that this petition for a writ of certiorari be granted.

Dated, San Francisco, California,
March 25, 1971.

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(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 24,110

Charles Allison,
Petitioner-Appellant,
vs.
Lawrence E. Wilson, Warden, et al.,
Respondents-Appellees.

[November 24, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, DUNIWAY and TRASK, Circuit Judges

Per Curiam:

Charles Allison, a California State prisoner, appeals from the dismissal of his civil rights action against his warden and two prison guards.[1] In his present complaint, Allison alleged that he was physically abused by prison guards Hayes and Thomas on two

[1]Allison's litigious propensities against his keepers were noted in another appeal by him in this court, *Allison v. California Adult Auth.*, 1969, 419 F.2d 822. See also *Allison v. Wilson*, 1967, N.D.Cal., 277 F.Supp. 271.

separate instances. The complaint does not indicate that the punishment was in any manner related to jail discipline.

Under identical circumstances, we have held that such a complaint states a cause of action under the Civil Rights Act, 42 U.S.C. § 1983. *Allison v. California Adult Auth.*, 9 Cir., 1969, 419 F.2d 822; *Wiltsie v. California Dep't of Corrections*, 9 Cir., 1968, 406 F.2d 515; *Dodd v. Spokane County*, 9 Cir., 1968, 393 F.2d 335; *Brown v. Brown*, 9 Cir., 1966, 368 F.2d 992. Although the appellees ask us to re-examine this line of cases, we decline to do so.

Appellees also contend that the district court properly dismissed the first cause of action because plaintiff failed to allege that the injury was inflicted "intentionally." Specific intent to violate constitutional rights is not a necessary element under Section 1983, see *Monroe v. Pape*, 1961, 365 U.S. 167, 187, and *Williams v. Field*, 9 Cir., 1969, 416 F.2d 483, 485. It is not necessary for us to consider whether negligent conduct may support a claim under Section 1983. Here the allegation that Hayes, after saying "I will show you some new rules," slammed a steel door shut, hitting Allison on the back, is a sufficient allegation of intentional conduct.

The case is remanded to the district court for further proceedings. On remand, the district court may consider dismissal of the proceeding under 28 U.S.C. § 1915(d) if it is satisfied that the action is frivolous or malicious. See *Allison v. California Adult Auth., supra*, 419 F.2d at 823-24.

Appendix B

United States District Court
Northern District of California

No. 45,594

Charles Allison,
Plaintiff,

vs.

Lawrence E. Wilson, Warden, San Quentin State Prison, et al.,
Defendants.

ORDER

This is a civil rights action brought under the provisions of 42 U.S.C. § 1983 by a prisoner at the California State Prison at San Quentin, to recover money damages for personal injuries sustained by him when prison guards allegedly mistreated him.

The case is presently before the court on the motion of defendants Thomas and Hayes to dismiss the action for lack of jurisdiction over the subject matter because the amended complaint fails to state a claim under 42 U.S.C. § 1983.

The amended complaint states in substance that on June 2, 1966 defendant Hayes, a correctional officer at the prison, kicked the door to plaintiff's cell shut,

hitting plaintiff with the door in the process; that on August 19, 1966 defendant Thomas, a correctional officer at the prison, pushed plaintiff against a fence, stood on plaintiff's foot for approximately ten minutes, and jerked plaintiff's feet out from under him; and that as a result of both of these incidents plaintiff sustained personal injuries, was subjected to cruel and unusual punishment, and was deprived of his right to due process and to equal protection of the law.

Plaintiff's amended complaint suggests no more than two isolated instances of assault and battery, neither of which is alleged to involve an attempt to restrict plaintiff in the exercise of any of his constitutional rights. Unless an assault and battery is alleged to have been designed to restrict the exercise of constitutional rights, no claim is stated under 42 U.S.C. § 1983. *Cullum v. California Department of Corrections,* 267 F.Supp. 524, 525-26 (N.D. Cal. 1967); *Wiltsie v. California Department of Corrections,* Civil No. 46637, at p. 2 (N.D. Cal. July 31, 1967); *Cole v. Smith,* 344 F.2d 721, 724 (8th Cir. 1965). The fact that a prisoner is assaulted and battered by prison officials does not, of itself, constitute a deprivation of any right protected or secured by the Constitution or laws of the United States. *Screws v. United States,* 325 U.S. 91, 108-09 (1945).

Furthermore, the mistreatment which plaintiff alleges falls far short of being cruel and unusual punishment. See *Jordan v. Fitzharris,* 257 F.Supp.

674, 679 (N.D. Cal. 1966); *Cullum v. California Department of Corrections,* supra, at p. 525.

For the above reasons plaintiff's amended complaint fails to state a claim under 42 U.S.C. § 1983, and therefore, the court lacks jurisdiction over the subject matter of this action.

Accordingly, it is the order of this court that the motion of defendants Thomas and Hayes to dismiss the action be, and the same is, hereby granted.

Dated: June 20th, 1968.

W. T. Sweigert,
United States District Judge

Original Filed June 20, 1968,
Clerk, U.S. Dist. Court,
San Francisco.